

**MINUTES**

**MONTANA SENATE  
59th LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN MIKE WHEAT**, on February 7, 2005 at  
10:00 A.M., in Room 303 Capitol.

**ROLL CALL**

**Members Present:**

Sen. Mike Wheat, Chairman (D)  
Sen. Brent R. Cromley (D)  
Sen. Jon Ellingson (D)  
Sen. Jesse Laslovich (D)  
Sen. Jeff Mangan (D)  
Sen. Dan McGee (R)  
Sen. Lynda Moss (D)  
Sen. Jerry O'Neil (R)  
Sen. Gerald Pease (D)  
Sen. Gary L. Perry (R)  
Sen. Jim Shockley (R)

**Members Excused:** Sen. Aubyn Curtiss (R)

**Members Absent:** None.

**Staff Present:** Valencia Lane, Legislative Branch  
Mari Prewett, Committee Secretary

**Please Note.** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing & Date Posted: SB 21, SB 352, SB 316, 2/2/2005  
Executive Action: None.

**HEARING ON SB 21****Opening Statement by Sponsor:**

**SEN. DUANE GRIMES (R), SD 39**, opened the hearing on **SB 21**, Restrict damages for reduced chance of patient's recovery.

**SEN. GRIMES** provided a copy of the final report of the Legislative Council on SJ Resolution 22. He explained the concept of "loss of chance". He cited from Section 3 of the bill. He indicated that he was prepared to offer amendments that would define the bill topic even more. As the bill stood it said that if there was a reduced chance before the procedure conducted by the physician then, after the fact, the jury could not consider the pre-injury status of the individual. The amendments he was proposing allowed for the fact that if there was less than a 50% chance of the individual obtaining pre-injury status, then the law would be applied proportionately. However, if there was more than a 50% chance then it would be applied as the original bill called for. He asserted that the bill and its amendments were a compilation of the efforts of all parties. He reserved the right to close.

**EXHIBIT(jus30a01)**

***{Tape: 1; Side: A; Approx. Time Counter: 0 - 5.8}***

**Proponents' Testimony:**

**Pat Melby, Montana Medical Association**, informed the Committee that the "loss of chance" doctrine allows a claimant in a medical malpractice case to show by a majority of evidence that medical negligence reduced the patients chances of recovery from illness or injury. He indicated that this was a change from the 1985 law enacted from a supreme court ruling. The purpose of this bill is to indicate that a proportional amount of damages can be attributed to a doctor. The amendments he discussed provide that if the patient's chance of recovery prior to the act or admission was greater than 50%, and that the negligent treatment or diagnosis reduced that chance, the damages would be 100% of the damages incurred by the patient. If, however, prior to the negligent act or admission the chances of recovery were less than 50% the patient would recover a proportionate amount of the damages. The Montana Medical Association thought that it was a good compromise and urged that the Committee give it a do pass recommendation.

***{Tape: 1; Side: A; Approx. Time Counter: 5.8 - 10.1}***

**Larry Riley, Senior Partner of Garlington Lawn and Robinson and representing Utah Medical Insurance Association**, thought that the value of this change in law was the basic fairness it presents. He urged that SB 21 do pass.

*{Tape: 1; Side: A; Approx. Time Counter: 10.1 - 12}*

**Mark Taylor, Representing Montana Hospital Association**, urged the do pass support of the Committee.

*{Tape: 1; Side: A; Approx. Time Counter: 12 - 12.9}*

**Tom Ebzery, Representing St. Vincent's Health Care, Holy Rosary Health Care, St. James Health Care, and Wheatlain Memorial Hospital**, was also part of the collaboration working on SJR 32. He encouraged the support of the Committee for SB 21 with all of the amendments.

*{Tape: 1; Side: A; Approx. Time Counter: 12.9 - 14.1}*

**Webb Brown, Montana Chamber of Commerce**, rose in support of SB 21 with its amendments.

*{Tape: 1; Side: A; Approx. Time Counter: 14.1 - 14.4}*

**SEN. GARY PERRY, SD 35, MANHATTAN**, requested that the amendments be handed out before the end of the hearing.

*{Tape: 1; Side: A; Approx. Time Counter: 14.4 - 15.2}*

**Janie McCall, Deaconess Billings Clinic**, gave support to SB 21 as amended.

*{Tape: 1; Side: A; Approx. Time Counter: 15.2 - 15.5}*

**Mona Jamison, Representing the Doctor's Company**, stood in support of SB 21 as amended. They also assisted with the work on SJR 32. She urged support of the Committee.

*{Tape: 1; Side: A; Approx. Time Counter: 15.5 - 16.4}*

**Joe Mazurek, Blue Cross Blue Shield**, indicated that the bill as amended would help reduce the cost of medical malpractice insurance. They support the bill as amended.

*{Tape: 1; Side: A; Approx. Time Counter: 16.4 - 17}*

**Steve Yeakel, Representing the Montana Council for Maternal and Child Health**, participated in the meetings for SJR 32. They support the bill because it addresses access issues. He expressed the support of the Council concerning SB 316 and SB 352 as well as SB 21.

***{Tape: 1; Side: A; Approx. Time Counter: 17 - 18.7}***

**Al Smith, Montana Trial Lawyers Association**, supports the bill, including the amendments. He mentioned that the language had been worked out with lawyers who try malpractice suits frequently. He urged the Committee to pass the bill and leave the amendments as they were. He pointed out that this bill would not bring down the cost of medical malpractice premiums although it might help to stabilize the costs. He agreed that it would place into statute and clarify something the court ruled on 20 years ago. He encouraged the Committee's support. He provided a written version of his testimony.

**EXHIBIT(jus30a02)**

***{Tape: 1; Side: A; Approx. Time Counter: 18.7 - 20.5}***

**Opponents' Testimony:** None.

**Informational Testimony:** None.

**Questions from Committee Members and Responses:** None.

**CHAIRMAN WHEAT** commended all of the parties who participated in the process to bring forward SB 21.

**Closing by Sponsor:**

**SEN. GRIMES** closed with an example of the type of situation this bill would address. He felt that it was a fair compromise.

***{Tape: 1; Side: A; Approx. Time Counter: 20.5 - 22.9}***

**CHAIRMAN WHEAT** closed the hearing on SB 21 and opened it to SB 352.

**HEARING ON SB 352****Opening Statement by Sponsor:**

**SEN. DUANE GRIMES (R), SD 39**, opened the hearing on **SB 352**, Clarify inadmissibility of medical malpractice legal panel decisions.

**SEN. GRIMES** summarized that some doctors felt that the medical malpractice panel was ineffective and some felt that it was a gateway to the courts. He claimed that the final decision was that it was effective and helpful. He said that this bill would enforce the fact that the findings of the medical legal panel would not be used subsequently in court nor would it be used in either 201--unfair claims, or 242--cause of actions. Basically the medical legal panel findings would not be used in issues of bad faith or breach of faith for an insurer. He did not think that the bill would broaden the law, just clarify it. He thought that it secured the ethical nature of the medical legal panel so that people would not view it as a potential for problems.

***{Tape: 1; Side: A; Approx. Time Counter: 22.9 - 26.7}***

**Proponents' Testimony:**

**Larry Riley, Representing the Law Firm of Garlington Lawn and Robinson and Utah Medical Insurance Association**, talked about the expenses of medical malpractice insurance. He provided a handout to the Committee. He provided background on his experience with medical malpractice cases. He mentioned that there were a numbers of bills being considered which would help the medical insurance companies in Montana. He stressed that the scarcity and expense of medical malpractice insurance is a huge problem. He explained that the bills that have been proposed would not in any way impair a wrongfully injured patient from recovering full redress in a medical malpractice claim. He covered the handout, explaining what it addressed and the areas he had highlighted. The problem with the panel is that in Montana there is the threat of bad faith claims against insurance companies. Some attorneys take the position that if the panel's vote was in support of the patient it would create liability as being reasonably clear. He asserted that the panel provided a valuable function but was a screening panel that did not go into great depths. He felt that just because there was a vote in favor of the claimant it was not enough to establish liability as being reasonably clear and open the doctor up to suits of bad faith. He clarified that a bad faith claim could still be brought against a doctor.

**EXHIBIT(jus30a03)**

During Mr. Riley's testimony, **SEN. CURTISS** arrived.

***{Tape: 1; Side: B; Approx. Time Counter: 0 - 10.2}***

**Pat Melby, Representing the Montana Medical Association,** supported SB 352 wholeheartedly. He pointed out that the language that was to be changed in the bill was worked out between the health care community and the trial lawyers. He encouraged a do pass recommendation.

***{Tape: 1; Side: B; Approx. Time Counter: 10.2 - 10.9}***

**Mark Taylor, Representing Montana Hospital Association,** supported the legal panel's purposes and credibility. He stood in support of the bill as amended.

***{Tape: 1; Side: B; Approx. Time Counter: 10.9 - 11.4}***

**Al Smith, Montana Trial Lawyers Association,** spoke in support of SB 352 because most the attorneys felt that it covers what the law requires. He agreed that the medical panel was only an advisory panel. He made note that **SEN. WHEAT** had helped encourage the creation of these bills.

***{Tape: 1; Side: B; Approx. Time Counter: 11.4 - 13.1}***

SEN. PEASE left the hearing at this time.

**Mona Jamison, Representing the Doctor's Company,** informed the Committee that the Doctor's Company was one of the two remaining medical malpractice insurers in the state of Montana. She stood in support of SB 352. She expressed that what was important about the bill is that it stabilized the environment which is important to have claims settled and addressed equitably.

***{Tape: 1; Side: B; Approx. Time Counter: 13.1 - 14}***

**Joe Mazurek, Representing Blue Cross Blue Shield,** urged support of SB 352.

***{Tape: 1; Side: B; Approx. Time Counter: 14 - 14.4}***

**Webb Brown, Representing the Montana Chamber of Commerce,** rose in support of SB 352.

***{Tape: 1; Side: B; Approx. Time Counter: 14.4 - 14.6}***

**Opponents' Testimony:** None.

**Informational Testimony:** None

**Questions from Committee Members and Responses:**

**SEN. BRENT CROMLEY, SD 25, BILLINGS,** wondered if there were any court cases in which the decision of the panel was admissible or relevant.

**Mr. Riley** replied that the issue had not gone to the Montana Supreme Court at this point. The problem is that in actual practice those arguments are being made. He indicated that the bill was an effort to clarify acceptable arguments.

**SEN. CROMLEY** followed up, asking about Section 27-6-606. He was unsure of how Subsection 3 had been placed in the bill because of the inherent conflict. He thought that they should get rid of Subsection 3.

**Mr. Riley** agreed that there was an internal conflict and it should be gotten rid of.

***{Tape: 1; Side: B; Approx. Time Counter: 14.6 - 17.5}***

**SEN. DANIEL MCGEE, SD 29, LAUREL,** suggested that both SB 352 and SB 21 had applicability sections that applied to causes of actions which arise after the effective date of the act but that there was no immediate effective date. He felt that this would mean that both the bills would be in effect October 1. He wanted to know if this was **SEN. GRIMES'** desire.

**SEN. GRIMES** responded that there was not an urgent need, although it was critical, to get the law changed. He did not perceive a rush arising from these bills.

**SEN. MCGEE** referred the question to Mr. Smith.

**Mr. Smith** reported that there had been a number of bills in the House on different aspects of medical malpractice. He informed the Committee that the House had placed a July 1, 2005, date on most of the malpractice legislation. He was not opposed to this date.

***{Tape: 1; Side: B; Approx. Time Counter: 17.5 - 19.3}***

**SEN. JON ELLINGSON, SD 49, MISSOULA,** followed up on **SEN. CROMLEY'S** question. He wondered if it was Mr. Riley's intention that if SB 352 was passed Subsection 3, 27-6-606 could not be utilized.

**Mr. Riley** thought that it could be utilized but felt that it should be amended to say that it could not be used for any purposes except for mediation purposes.

**SEN. ELLINGSON** followed up, asking if it was Mr. Riley's sense that the coalition that came to an agreement on SB 352 understood and desired that to be the case.

**Mr. Riley** remarked that the issue had not arisen before this hearing but seemed like a reasonable way to resolve the issue. He did not think that there was anything wrong with the bill.

**Mr. Smith** addressed the question as well. He asked that they might be able to figure out an amendment before executive action.

***{Tape: 1; Side: B; Approx. Time Counter: 19.3 - 21.9}***

**SEN. JERRY O'NEIL, SD 3, COLUMBIA FALLS**, wondered if a patient, who was not covered by an insurance company but went through the legal panel and the panel ruled in their favor, could use the ruling to file a bad faith claim against their insurer.

**Mr. Smith** explained that the bill stated that the evidence of the panel could not be admissible in any bad faith action. He thought that a letter in this incident might be used as evidence that the claimant had contacted the insurance company but the decision would have to be out based on the law in SB 352.

***{Tape: 1; Side: B; Approx. Time Counter: 21.9 - 23.7}***

**CHAIRMAN WHEAT** noted that his questions pertained to the third page of Mr. Riley's handout. He clarified that SB 352 was just making it clear that one could not use the panel decision for any purpose in an insurance bad faith claim. He wanted to know how this related where an incident required merely mediation.

**Mr. Riley** restated that he did not think anyone had thought about that situation. He felt that, the way to solve the internal conflict brought about by the subsection, was to take Section 3 out or to say that for purposes of mediation the vote of the panel could be used to advise the court that an individual was applying for Section 3, and the vote of the panel could not be used for any other purpose.

***{Tape: 2; Side: A; Approx. Time Counter: 0 - 2.1}***

**CHAIRMAN WHEAT** asked if they couldn't just change the rules that governed the medical legal panel.



**Mr. Riley** agreed that this was another way to deal with the problem.

**CHAIRMAN WHEAT** felt that the legislation had expressed the desire to see mediation occur and thus he felt it would be better to change the rules that apply to the panel rather than try to change the statute.

**Mr. Riley** affirmed that this might be an easier method.

*{Tape: 2; Side: A; Approx. Time Counter: 2.1 - 3.3}*

**SEN. O'NEIL** interpreted Mr. Riley's comments to mean that parties to the mediation would not be able to show the mediator the results of the medical panel.

**Mr. Riley** replied that, technically, an individual is not supposed to share the results. However, as a matter of actual fact, the outcome is often discussed with the mediator. He indicated that if an insurance company is acting in bad faith, the entire file on the patient gets turned over.

**SEN. O'NEIL** followed up, stating that mediation is an informal communication between parties. If they decided that the panel's decision should not be shared with the mediator it would be the first time in his understanding that the legislature had given any laws or rules regarding evidence to be introduced in a mediation session.

**Mr. Riley** did not think that they were trying to do this. The individuals who mediate the medical legal cases are experienced defense lawyers and judges and do not need the ruling of the panel. He asserted that they were more interested in the specifics of the case rather than the panel's decision.

*{Tape: 2; Side: A; Approx. Time Counter: 3.3 - 6.7}*

**Closing by Sponsor:**

**SEN. GRIMES** did not intend for anything to change in regard to the mediation or the purposes and effect of the medical legal panel. He reiterated that all they wanted to change was that the panel's decision would not be used for allegations for charges of bad faith and the repercussions in subsequent court proceedings.

*{Tape: 2; Side: A; Approx. Time Counter: 6.7 - 8.4}*

**CHAIRMAN WHEAT** closed the hearing on SB 352 and opened the hearing on SB 316.

**HEARING ON SB 316****Opening Statement by Sponsor:**

**SEN. GREG LIND (D), SD 50**, opened the hearing on **SB 316**, Revise reporting mechanism for medical malpractice insurers.

**SEN. LIND** claimed that SB 316 was a simple bill. He wanted to re-institute the requirement that medical liability insurers report certain pieces of information to the insurance commissioner. He reserved the right to close.

***{Tape: 2; Side: A; Approx. Time Counter: 8.4 - 10.2}***

**Proponents' Testimony:**

**Pat Melby, Representing the Montana Medical Association**, explained what SB 316 would do. The Association felt that the bill would be very helpful to inform people of what is happening with medical malpractice suits in Montana. He informed the Committee that there was a section of SB 316 which differed from the old law. They limited the requirement only to medical malpractice insurers. They also worked with the Doctor's Company in deriving what kind of information should be reported. They made sure that the definition of insurer was broad enough to include captive insurers because the Hospital Association belongs to captive insurers. He urged the Committee to give a do pass recommendation.

***{Tape: 2; Side: A; Approx. Time Counter: 10.2 - 14}***

**Mark Taylor, Representing Montana Hospital Association**, had worked with the MMA and the interim committee to look at the type of language that would be suitable. They believe that the language proves workable for all parties involved.

***{Tape: 2; Side: A; Approx. Time Counter: 14 - 15}***

**Mona Jamison, Representing The Doctor's Company**, stood in support of SB 316. She commented that no one knew why the previous law dealing with this issue had been repealed. She expressed that the information was a right of the public. She urged the support of the Committee.

***{Tape: 2; Side: A; Approx. Time Counter: 15 - 16.6}***

**Tom Ebzery, Representing St. Vincent Health Care, Holy Rosary Health Care, St. James Health Care and Wheatlian Memorial**, spoke in support of SB 316. He emphasized that enactment of all of the

bills heard on this day by Judiciary would not reduce premiums. They want to see more than two insurers representing medical malpractice in Montana.

***{Tape: 2; Side: A; Approx. Time Counter: 16.6 - 18.8}***

**Joe Mazurek, Representing Blue Cross Blue Shield**, supported the bill.

***{Tape: 2; Side: A; Approx. Time Counter: 18.8 - 19.2}***

**Al Smith, Montana Trial Lawyers Association**, did not work on this bill but they supported the bill.

***{Tape: 2; Side: A; Approx. Time Counter: 19.2 - 19.6}***

**Opponents' Testimony:**

**Jacqueline Lenmark, Representing the American Insurance Association**, opposed SB 316. She commented that medical negligence does occur; however, the difficulty with the issue is the way that the insurance premiums are developed. She wanted the Committee to understand that the pricing of medical malpractice insurance is not like the pricing of auto insurance. She reported that while medical negligence is rare it is also very costly. The insurance code in Section 33-23-301 prohibits insurance companies from using an accusation or allegation of medical negligence in pricing the product if in fact damages are not awarded. Her concern with this legislation is that the information to be collected would be costly. She also expressed concern with the privacy and confidentiality of the information being collected. They have further concerns with delegation of authority to the insurance commissioner in Section 1, Subsection H. She talked about the repeal of the statute 33-23-311. She concluded by stating that it was important to remember how the medical malpractice rates are regulated. She respectfully requested that the Committee give the bill a do not pass recommendation.

***{Tape: 2; Side: A; Approx. Time Counter: 19.6 - 27.8}***

**Informational Testimony:** None.

**Questions from Committee Members and Responses:**

**SEN. JESSE LASLOVICH, SD 43, ANACONDA,** asked if any of the companies Ms. Lenmark represented had been in Montana and had to report under the previous law.

**Ms. Lenmark** replied that she was unsure but believed that the information was not being collected by the department because it is not information which insurance companies typically retain.

**SEN. LASLOVICH** followed up by inferring that the companies Ms. Lenmark represented were not involved with the previous statute.

**Ms. Lenmark** clarified that the companies she was representing had attempted to comply with the statute and would have complied with the statute.

*{Tape: 2; Side: A; Approx. Time Counter: 27.8 - 30.2}*

**SEN. LASLOVICH** referred to a statement by Ms. Lenmark in which she stated that the collection on the information would be too costly. He asked Ms. Jamison if she thought the process would be too costly.

**Ms. Jamison** did not think that it would be costly because everything is computerized. She explained that when first discussing the bill their fear had been that the tasks that they were going to be asked to do would have to be done by hand. If that had been the case, she confirmed that they would not have been able to do the collection of information.

*{Tape: 2; Side: B; Approx. Time Counter: 0 - 1.7}*

**CHAIRMAN WHEAT** found it interesting that Ms. Lenmark was representing insurance companies who, as the premium rates continue to increase in the state, would not want to come into Montana and help the doctors by offering them insurance at a lower price than what is being charged. He also found it interesting that she was opposed to a bill that was supported by at least one of the insurance companies in the state which was insuring Montana doctors. He wanted to know why the companies which she represented were not coming into the state and providing malpractice insurance before SB 316 arose.

**Ms. Lenmark** remarked that the American Insurance Association supported most of the bills contained in the packet. She could not speak to the business decisions of the individual insurance companies to discontinue writing medical malpractice insurance in Montana. She expressed that it was the goal of the Association and its members to market insurance in a state where they feel that they can do business in a profitable, conscientious, and

considerate manner. They feel that this piece of legislation would discourage the return of insurance companies.

***{Tape: 2; Side: B; Approx. Time Counter: 1.7 - 3.9}***

**Closing by Sponsor:**

**SEN. LIND** addressed the concern of confidentiality. He indicated that if there were a number of closed claims within the state it might be possible to look at aggregate data with a small denominator and determine the size of a particular settlement. He informed the Committee that the lowest number of paid claims over the last four years was 57. He thought that it would be difficult to tease out the amount of a particular settlement by looking at aggregate data. He closed by saying that this issue is a big problem and people need good decisions to decrease medical liability insurance premiums. He asked for a do pass consideration.

***{Tape: 2; Side: B; Approx. Time Counter: 3.9 - 5.4}***

**CHAIRMAN WHEAT** closed the hearing on SB 316.

**ADJOURNMENT**

Adjournment: 11:27 A.M.

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SEN. MIKE WHEAT, Chairman

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for MARI PREWETT, Secretary

MW/mp

Additional Exhibits:

**EXHIBIT ([jus30aad0.PDF](#))**